No. 341

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION

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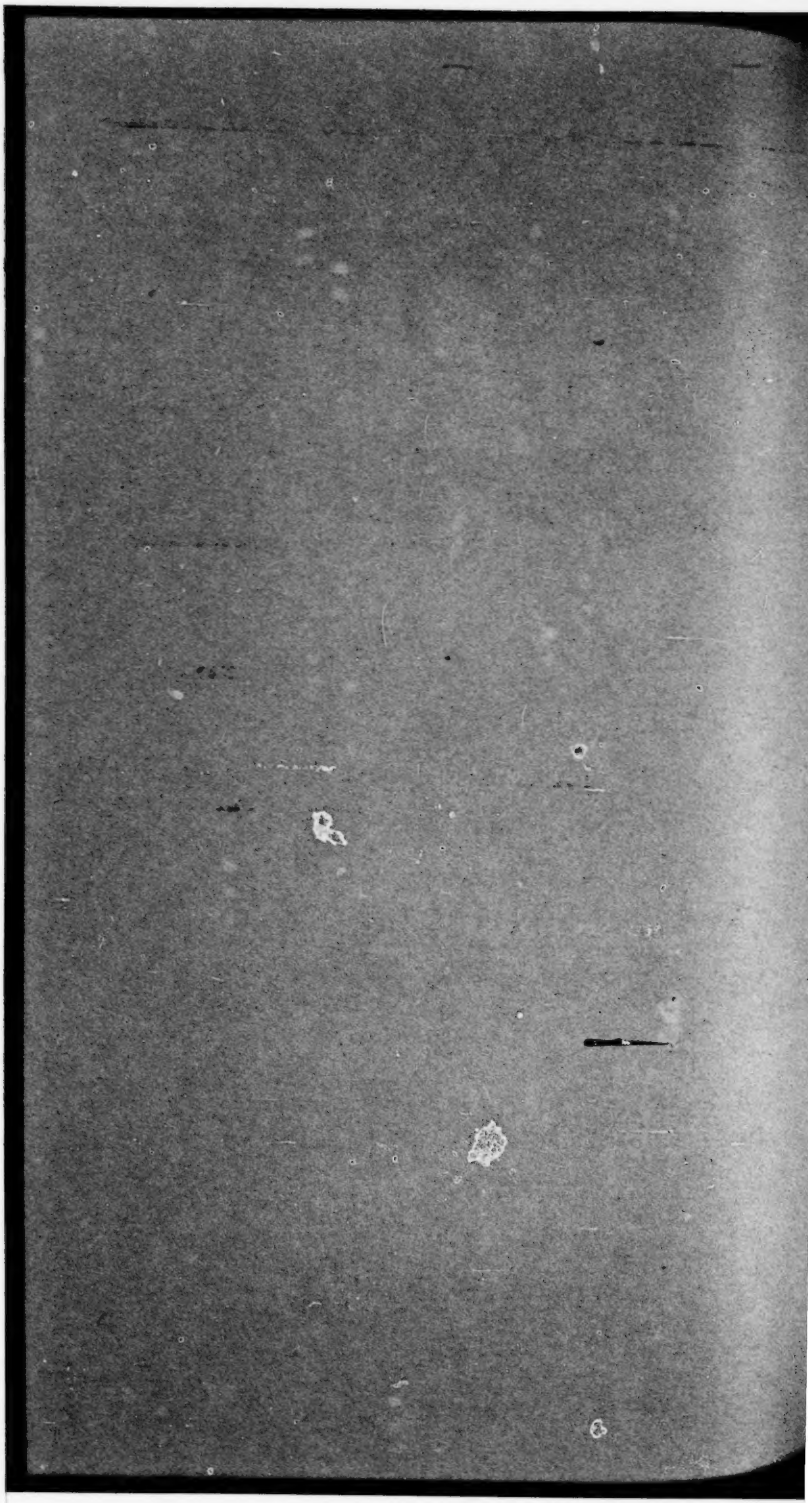

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The opinion of the United States Court of Appeals for the Fifth Circuit under review holds that federal law, rather than the law of the State of Louisiana, is applicable herein.[1] The memorandum for the United States as amicus curiae states:

[1] R. 78 and R. 107, reported at 344 F.2d 432, 439.

> "Since it reversed Judge Wright on the sole ground that he had applied the wrong law, the court of appeals did not consider the correctness of the findings of fact contained in Judge Wright's opinion (he did not issue separate findings). Their correctness, accordingly, is not an issue before this Court in this case." (Page 7, footnote 4)

The brief of the Solicitor General, therefore, is restricted to the sole issue whether State or Federal law governs. The Court of Appeals did not render an opinion on the interpretation of the Option Agreement either in its original decree or on Pan American's petition for rehearing. Nor did the Court render an opinion on the applicable Louisiana law relied upon by Pan American. L.S.A.-C.C. 2040[2]; *Welsh* v. *Wyatt* (2nd Circuit 1964) 164 So. 2d 393, rehearing denied May 28, 1964, petition for a writ of certiorari to the Supreme Court of Louisiana denied on June 30, 1964; *George W. Garig Transfer, Inc.* v. *Harris*, 226 La. 117, 75 So. 2d 28 (1954) reh. denied.

Pan American's *ownership* of the lease is entirely independent of assertion of title by estoppel or avoidance of the parol evidence rule as relied upon by the District Court. Further, to establish *ownership* of the lease Pan American is not required to invoke the doctrine of "constructive trusts" which is recognized in the federal common law and in the common law of other states but not in Louisiana. Pan American's *ownership* is clear under Louisiana law.

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[2]The codal article 2040 of the Civil Code provides: "The condition is considered as fulfilled when the fulfillment of it has been prevented by the party bound to perform it."

In short, Pan American is entitled to ownership of the lease and specific performance under either Federal or State law. Since the Court of Appeals did not adjudicate Pan American's rights on the merits under Louisiana law, there is no basis for affirming the judgment of the District Court, as prayed for by Wallis, even if it be assumed for the sake of argument that the Court of Appeals misconceived the applicable law. It is for that Court to review the judgment of the District Court in the light of the Option Agreement and the controlling Louisiana law.

STATEMENT OF CASE

The "Statement" in the Solicitor General's memorandum for the United States ably illustrates the distinction between "acquired" and "public domain" land and the significance thereof. (See pp. 1, 2, 3, thereof). However, it does not delineate the circumstances under which Wallis wrongfully maneuvered for his own benefit to accomplish the destruction of the original acquired lands applications UNDER OPTION to Pan American and the avoidance of his obligations under the Option Agreement[3].

The Option Agreement dated March 3, 1955 covered five "acquired lands" applications. (R. 40) The acquired lands applications were the only ones pending at the time the contract was executed. Pan American's attorneys were cognizant of the form and status of the Wallis acquired lands applications and approved

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[3]In order that all pertinent facts involved are before the Court in light of Wallis' statement of case, references will be made to the original record and Pan American's original exhibits. The printed record will be designated with the letter R.

the actions of Wallis until about August, 1955 when their connection with the applications terminated. Neither Pan American's attorneys nor Pan American itself knew of the filing of the public domain offer by Wallis for his own benefit on March 8, 1956 until *after* issuance of the lease on December 19, *1958*. (R. 57)

Wallis was advised by his Washington attorney that his pending "acquired lands" applications were defective because the description did not connect with a corner of the public lands survey. To obtain the lease in controversy Wallis admittedly improved the description contained in the pending offers to make it "foolproof" and then filed, not one, but two new applications to lease:

a. One on the "public lands" form in his own name (R. 69); and,

b. One on the "acquired lands" form in the name of his brother-in-law, T. Miller Gordon (Pan Am's Or. Ex. B-8)

Both applications contained the identical "new" and "foolproof" description embracing *the same land* covered by the original "acquired lands" applications under option to Pan American.

Wallis filed the "public land" offer on March 8, 1956 but did not file the T. Miller Gordon "acquired lands" offer until March 27, 1956. Wallis then filed a Protest on March 26, 1956, Pan Am's Or. Ex. C-4, (the day before the T. Miller Gordon "acquired lands" offer was filed) against favorable action being taken on the pending Morgan "public lands" offer. (Pan Am's Or. Ex. C-5; C-12a)

The basis of the Protest of Wallis was, "The land in controversy is unsurveyed . . . and each offer must describe unsurveyed lands 'by metes and bounds description connected with a corner of the public lands surveys' by courses and distances (and) the metes and bounds description contained in protestee's offer is not connected with a corner of the public lands surveys". (Pan Am's Or. Ex. C-4 at p. 4) The Protest asserts that the description contained in Morgan's offer "is insufficient to identify the lands intended to be requested". The Protest filed by Wallis requested the recognition of *his* "public lands" offer "as entitled to priority over Protestee's said offer with respect to the land in controversy." (Pan Am's Or. Ex. C-4 at p. 8) No reference whatsoever was made by Wallis in this Protest to the pending "acquired lands" offers — either the original offers or the T. Miller Gordon offer. The record demonstrates that thereafter Wallis, an admitted agent and fiduciary under the Option, made no effort whatsoever to acquire leases under and by virtue of the "acquired lands" offers as the Option plainly obligated him to do and as he himself admits. (Pan Am's Or. Ex. A-1, p. 3, pr. 2; C-6 at pp. 33, 34; C-10 at p. 1; 65 I.D. 369, *Morgan* v. *Udall*, 113 U.S. App. D.C. 192, 306 F 2d 799, cert. denied 371 U.S. 941)

The decision of the Bureau of Land Management June 7, 1956 is a demonstration that the Morgan offer was rejected on the specific ground, as asserted in the Wallis Protest (Pan Am's Or. Ex. C-4 at p. 4) that the Morgan description was not connected to a corner of the public land surveys by courses and distances, as required, and the Wallis public land application was sufficient to identify the land in accordance with the regulation (Pan Am's Or. Ex. C-10 at p. 4 and D-2 at

p. 5) The decision specifically rejected the Wallis "acquired lands" offers described in the Option "because there are no acquired lands covered in the applications." (Pan Am's Or. Ex. C-6 at p. 34) The Director said:

> "It is realized that many new points have been raised by the Bureau in this decision which were not before in issue between the applicants nor has an opportunity been afforded the parties in interest to answer these issues. Therefore, all parties are given 30 days in which to show cause, and to submit evidence and briefs, if they desire, why action should not be taken in accordance with the views expressed herein." (Pan Am's Or. Ex. C-6 at pp. 33-34)

While Wallis testified that "I am not attempting to prosecute that suit up there to the exclusion of the acquired lands application" (Or. Supp. R. 23) he ignored the "opportunity" afforded by the Bureau. (Pan Am's Or. Ex. C-6 at pp. 33-34) The fact is that neither Wallis nor Morgan objected to the decision of the Director that the character of the land was "public land" and not "acquired land." (Pan Am's Or. Ex. C-10; D-11 at p. 4) Wallis insists it would have been "foolhardy" for him to do so. (Or. Supp. R. 12) His counsel had advised him on February 3, 1956, that the description in the original "acquired lands" applications was "vulnerable". (Pan Am's Or. Ex. B-6) The strawman Gordon offer was not involved in the Director's decision, which specifically refers only to the five "ac-

quired lands" offers described in the Option. (Pan Am's Or. Ex. C-10)

On the appeal of Morgan to the United States District Court for the District of Columbia in *Morgan* v. *Udall*, 113 U.S. App. D.C. 192, from the decision of June 7, 1956, Edelstein, counsel for Wallis, vigorously asserted the lands were "public lands" and not "acquired lands". (Pan Am's Or. Ex. D-10) However, Judge Hart did not decide the disputed "character" of the land and merely held that on the Administrative Record before the Secretary, as stipulated by the parties to the action:

> "a. There was *substantial* evidence to support the decision of the Secretary of the Interior rejecting Morgan's applications and granting Wallis' public lands applications."
>
> "b. The Secretary of the Interior was not *arbitrary* or *capricious* in reaching that decision."
>
> (Pan Am's Or. Ex. D-11 at p. 6)

United States District Judge Hart held as a fact that:

> "The Director ruled that neither party had shown cause why the acquired lands offers should not be rejected and, accordingly, he ordered the final rejection of these offers and closing of the case." (Pan Am's Or. Ex. D-11 at p. 4)

Neither Judge Hart nor the U. S. Circuit Court of Appeals, as demonstrated by their respective decisions, has held that the land involved — in fact and in law — is "public domain" land of the United States. Their decisions simply affirm an Administrative Ruling to which Wallis neither objected nor offered any evidence or argument to contradict. (Pan Am's Or. Ex. D-11)

The Federal District Court recognized (Note 2) that the pending suit styled "*State of Louisiana* vs. *Floyd A. Wallis*, et al," E.D. La., C.A. 9046, involved the assertion by the State of Louisiana of title to the land involved here and disputes the right of the United States to grant the lease covering that acreage.[4] (R. 66)

Petitioner, upon the issuance of the public lands lease BLM 042017, took the position that the Option covered only leases issued in direct response to the acquired

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[4]Shortly after the issuance of the lease to Wallis, he applied for a permit to drill and staked a well location on the lease. He was prevented from operating by action of the State of Louisiana which sought an injunction in the State court. This action was transferred to the United States District Court for the Eastern District of Louisiana. (*State of Louisiana* v. *Floyd A. Wallis*, et al, E.D. La. Civil Action No. 9046). The California Company and Shell Oil Company, who own leases from the State of Louisiana covering the Wallis lease lands, and Pan American made appearances in the suit. At the suggestion of the court, Wallis, the lessee of the United States, Shell and California, the lessees of the State of Louisiana, and Pan American entered into an operating agreement without prejudice to the respective claims of the parties. The disputed property was developed and is now being operated thereunder by Shell Oil Company, the designated Operator, for the parties ultimately determined to be the owners. The suit of the State of Louisiana was dismissed.

lands applications specifically referred to in the Option Agreement and, for that reason, refused to assign BLM 042017 to Pan American.

The District Court denied specific performance. (R. 65)

Pan American in its original and reply briefs before the Court of Appeals urged that if Louisiana law was held to be applicable: 1. The Option Agreement in clear and unambiguous terms covers and attaches to the lease; and, 2. Wallis under Louisiana law could be compelled to assign the lease to Pan American without resort to parol testimony.

In the original opinion of the Fifth Circuit, the Court held that "the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States" (R. 80) and "the doctrine of resulting trusts . . . may have application to the facts of this case." (R. 81) Each party to the litigation filed a timely petition for a rehearing and supporting briefs. (R. 108) This opinion was confirmed by the majority on rehearing and the judgment of the District Court was vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law. (R. 114)

SUMMARY OF ARGUMENT

1. The Federal Government has an interest under the Mineral Leasing Act of 1920 requiring a uniform rule of law in a suit between private individuals to discourage inceptive fraud in the processing of federal leases. Furthermore, the physical location of the public domain land in Louisiana and the domicile of Wallis in Louisiana are incidental to the determination of title to a federal lease.

2. Section 32 of the Mineral Leasing Act of 1920, 30 U.S.C. 189, does not deprive the federal courts of the responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.

3. The Mineral Leasing Act is federal in scope. The issuance of a mineral lease, unlike a patent, does not divest the United States of "all authority or control" and the lease remains under the continuing supervision of the government. True ownership of a lease is not such a local matter as may be determined by a unique rule of Louisiana law. The parol evidence rule itself is uncertain and ambiguous. The rule is in direct conflict with 43 C.F.R. 3128.1 which requires the disclosure of oral agreements. A decision in favor of the application of the law in Louisiana undoubtedly will affect the interests of the United States although the issue arises in a suit between private individuals.

4. If state law be applicable, this case should be remanded to the Court of Appeals for a decision on

the merits of the litigation. The District Court adhered to an inability "to disregard technicalities" and held that the instruments limited the claims of McKenna and Pan American to the original acquired lands applications (R. 73) and if Wallis did breach his contracts, he may be answerable in damages[5]. (R. 70) The only issue decided by the Court of Appeals was that federal law applied. The Court did not interpret the Option Agreement. Nor did it determine whether specific performance could be granted under Article 2040 of the Civil Code and the decisions thereunder which the trial court ignored in rendering its decree. On rehearing the Court of Appeals again held that federal law governed the dispute without adjudicating the two issues posed by Pan American either of which is clearly dispositve of the litigation.

ARGUMENT

1. *Federal Law is Applicable*

The basic issue posed is whether the federal government has an interest herein arising out of the Mineral Leasing Act affecting "public domain land" which requires the application of federal law[6].

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[5]The Court below also stated: "Nor does it matter whether Wallis obtained his lease by breaching his trust as alleged" (R. 70) (and) In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest. (R. 75)

[6]The Court below held "there is sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American.

Wallis contends there is no "duty" upon the federal courts to invoke equity to properly vest the legal title to public lands and that federal courts apply federal law only to the review of matters which transpired or were initiated in the Land Department. The Solicitor General states that the Mineral Leasing Act "contains no provisions governing the private business relations of parties to oil and gas ventures and does not purport to impose on oil and gas entrepreneurs a duty to deal fairly with their partners or associates." (Memorandum for United States at p. 11) It is further suggested that "any unfairness by Wallis here occurred after he obtained the lease, when he refused to assign interests therein to McKenna and Pan American." (Memorandum for United States at p. 12 n. 9) However, the alleged fraud of Wallis was inceptive which differentiates this case from *McCullock Oil Corporation of California*, No. A-30208, (November 25, 1964) cited by the Solicitor General. It began when Wallis first made the mental decision to circumvent his obligations to Pan American by filing the new applications with a corrected description for his personal account and continued uninterruptedly thereafter. Wallis not only refrained from diligently prosecuting the original acquired lands applications but actually effectuated their destruction. Of this there is no doubt. The fact that Wallis filed in the Land Department *an acquired lands application for his own account with the corrected description in the name of his brother-in-law, T. Miller Gordon, is controlling proof.* By lulling Pan American into a false sense of security, Pan American was deprived of specific knowledge to which it was entitled, to wit: that the original descriptions were defective. Pan American

accordingly was deprived of any opportunity to correct the erroneous description. Pan American was deprived of the right to file a Protest against Wallis himself in the Department of the Interior to establish Pan American's rights under the Option Agreement. Pan American could not have anticipated that Wallis would subsequently claim the lease in derogation of its fundamental rights under the Option Agreement. The fraud of Wallis conclusively prevented Pan American from asserting its rights in the Department of the Interior to the lease in dispute and to the T. Miller Gordon "acquired lands" application. Since the Land Department had no knowledge of the fraud of Wallis obviously it did not act improperly in granting the lease to Wallis, but at the time of issuance the lease which Wallis obtained was tainted with fraud with respect to his own actions in attempting surreptitiously to obtain it for his personal benefit.

Duplicity by an agent for selfish gain has been denounced universally in Christian jurisprudence since the Scriptures. The purity of the fiduciary relationship is a precept of morality untarnished by the Ages.

> "No man can serve two masters; for either he will hate one, and love the other; or he will attach himself to one and think lightly of the other. You cannot be servants both of God and of money." Matthew 6:24; Luke 16:13.

The facts in *Massie* v. *Watts*, 6 Cranch 148 (1810), invite comparison with those in the instant suit. Both cases involve a fiduciary who attempted to take ad-

vantage for his personal gain of an error in the description of land he was obligated to obtain pursuant to his trust. Massie acted as a "locator." Wallis acted under the Option as an Applicant. Massie encountered difficulties respecting the location. Wallis encountered difficulties respecting the location also, the final description of which he was advised had to be "foolproof" to overcome the prior "vulnerable" descriptions in his own original "acquired lands" offers and the competitive Morgan offers. Massie, as agent, entered and surveyed a portion of the same land for himself. Wallis correctly described *the same land* for himself and simply filed new offers on the advice of counsel. Massie obtained a patent in his own name. Wallis obtained a mineral lease from the United States in his own name. The filing by Wallis of the "public lands" offer for himself coupled with the "hiding" and "sterilization" of the T. Miller Gordon offer in the name of his brother-in-law, plus the new "foolproof" description, all constitute a "withdrawal" — identical in effect with Massie's withdrawal — of the "acquired lands" offers.

The following are two illustrations:

1. If any lawyer accepted a retainer from a client to obtain an "acquired lands" lease and thereafter accepted a second retainer from another client to obtain a "public domain lands" lease or an "acquired lands" lease containing a foolproof description rather than the erroneous description in the original acquired lands applications on the same land, a disbarment proceeding would be in order.

2. It was the duty of Wallis (as held in *Massie* v. *Watts*, supra) as an agent and fiduciary and also under the Agreement itself to amend or correct the deficient description in the original "acquired lands" applications. Wallis was under a paramount duty to validate the "acquired lands" offers. Wallis could not take advantage, for his personal gain, of the knowledge of the faulty description which he acquired while so acting as an agent and fiduciary and under the Agreement. If this were possible, as Wallis contends, every lawyer who examines a title which he ascertains requires curative work would have the right to acquire the outstanding title for the lawyer's own benefit. In *Ringo* v. *Binns*, 10 Peters 269, the Court in 1836 held that if an agent discovers a defect in the title of his principal, he cannot misuse it to acquire title for himself.

The location of the public domain lands in Louisiana and the domicile of Wallis in Louisiana are purely incidental to the fundamental fact that it is the determination of ownership of a federal lease issued pursuant to federal activities in Washington, D. C. which is involved so that the uniform principles of federal law in this area of federal concern must be applied. It is submitted that the victim of Wallis' acts should not be deprived of the Option to obtain this federal lease simply because Wallis happens to reside in Louisiana.

Interstitial restrictions imposed by Louisiana may not decree who the federal government's lessee shall be and may not under any circumstances prohibit or interdict the transfer of federal leases. The judicial determination of the rights of Petitioner and Respond-

ent with respect to the ownership of the federal lease must be governed exclusively by a uniform rule of law which recognizes the equitable principle of resulting and constructive trusts. The principle is stated in the landmark decision of *Irvine* v. *Marshall, et al.*, 61 U.S. (20 How.) 558 (1858), cited by the Fifth Circuit Court of Appeals on pages 434-435 (344 F. 2d) of the opinion, and which approved *Massie*, supra.

Whether the United States is under a "duty" from a technical viewpoint to prevent fraud as between private litigants in this type case is not the question. *The issue is whether the United States has such "an interest" in the subject matter as to discourage false information and inceptive fraud in the processing of federal leases. Anyone guilty of deliberate wrongdoing in the Land Department should be deprived of the fruits of his perfidy. Only by this rule can the integrity and the sanctity of all dealings whatsoever within the Land Department itself be preserved.* Of course, the Mineral Leasing Act lacks an expressed statutory sanction for the pronouncement. However, in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-57 (1957) a similar situation — lack of an express statutory sanction — was presented. The language employed by the Court is clear and may be paraphrased as stating the rule to be as follows:

> We conclude that the substantive law to apply in (aid of the uniform implementation and protection of federal interests under the Mineral Leasing Act) is federal law which the (Federal Courts) must fashion from the policy of our (Mineral Leasing Act in a suit involving private individuals) . . . The (Mineral Leasing

> Act) expressly provides some substantive law. It points out what . . . may or may not (be done in certain situations). *"Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."*

The "range of judicial inventiveness" in "fashioning a remedy" (application of the doctrine of constructive trusts) will effectuate the objectives of the Mineral Leasing Act.

The Solicitor General's position is that "as the facts of the present case illustrate, the issues involved in such dispute are the kind normally resolved as questions of private law." The word "normally" is inapplicable. This is not a normal case. Inceptive fraud of Wallis in the Land Department is involved here. This Court and the courts of the common law states have recognized constructive trusts based on inceptive fraud and it is difficult to comprehend why Pan American should be relegated to "private law" when the unique law of Louisiana is said not to recognize the constructive trust rule. While Pan American is entitled to ownership of the lease under Louisiana law, we submit that as a matter of policy a uniform rule of federal law that recognizes resulting trusts[7] must

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[7]The record in this case demonstrates beyond argument that Petitioner breached his trust and fiduciary obligations to Pan American. The opinion of the Fifth Circuit, underscored the holding in *Massie* v. *Watts*, 6 Cranch 148 (1810), that "Accord-

be applied to inceptive fraud of the type committed by Wallis in the Land Department. The fraud of Wallis was continuous from the moment he made the "public domain" offer for his own account and maneuvered the nullification of the original "acquired lands" applications.

The Mineral Leasing Act would be materially furthered if a uniform rule of federal common law is made applicable to inceptive fraud committed by a lease applicant BEFORE the issuance of a lease in such a situation. Any other rule would permit the Land Department to be used by an unscrupulous offeror as an instrumentality for fraud with respect to mineral leases which may be issued without an interested party having the opportunity to assert his rights.

2. *The Mineral Leasing Act for Public Domain Land*[8]

The majority opinion specifically stated:

> "The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied."

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ing to *the clearest and best established principles of equity*, the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than a trustee for his principal.*" (Emphasis by Fifth Circuit Court of Appeals).

[8]Act of February 25, 1920; Mineral Leasing Act of 1920; 41 Stat. 437; 30 U.S.C. 181 et seq.

"* * * federal issues in such cases will be decided by reference to federal law."

"The 'Erie doctrine' does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests."

Petitioner contends that the second opinion of the Court of Appeals is erroneous because Section 32 of the Mineral Leasing Act "unqualifiedly precludes the "federal courts" responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest "as respects the Leasing Act." (Brief for Petitioner at p. 31) Section 32 of the Act reads:

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and do any and all things necessary to carry out and accomplish the purposes of sections 181-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes thereof. Nothing in said sections shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. February 25, 1920, c.85, § 32, 41 Stat. 450."

Petitioner's argument based on the above section is

entirely erroneous and should be specifically rejected. Even the Solicitor General in his brief has apparently not subscribed to it.*

The dissenting opinion below concedes the power of a federal court to fashion federal common law herein:

> "I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded. For many years, before *Erie*, the federal 'judge followed his own nose'; he 'sat down and looked up what relevant federal law there might be in the cases and otherwise decided what the law ought to be * * * though in some instances the judge might consider relevant state decisions'. Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the 'new' federal common law: 'We may *have* not achieved the best of all possible worlds with respect to relationship between state and federal law. But the combination of *Erie* with *Clearfield (Clearfield Trust Co.* v. *United States*, 318 U.S. 363,

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*"In these circumstances, we believe that the rights of the litigants may properly be left to determination under principles of State law *unless the application of such principles would undermine some federal interest or policy — here, one drawn from the Mineral Leasing Act of 1920.* See *Free* v. *Bland*, 369 U.S. 663; *Bank of America* v. *Parnell*, 352 U.S. 29; *Sola Electric Co.* v. *Jefferson Co.*, 317 U.S. 173; Note *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv. L. Rev. 1084 (1964)." (Emphasis added)

> 63 S.Ct. 573, 87 L.Ed. 838) and *Lincoln Mills (Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972) has brought us to a far, far better one than we have ever known before.' " (344 F. 2d 442).

This Court's interpretation of several similar worded provisions contained in the Reclamation and Irrigation laws, the Boulder Canyon Project Act and the Water Power Act demonstrate that Section 32 of the Mineral Leasing Act does not ipso facto preclude the responsibility of the Federal Courts to implement and protect federal interests. The proviso in Section 32 is not unique or peculiar to the Mineral Leasing Act. In *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958) one of the main issues was whether the validity of the contracts involved was governed by Federal or State law in light of Section 8 of the Reclamation Act of 1902. The State's argument was that Section 8 nullified the right of the Secretary of the Interior to implement and effectuate natural reclamation policies. Section 8 of the Act, 43 U.S.C. 383 stipulated:

> "Nothing in sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in

> such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. June 17, 1902, c.1093, § 8, 32 Stat. 390."

Justice Clark, as organ for the unanimous Court, delivered the opinion:

> "As we read §8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects."
>
> ****
>
> "In light of these congressional actions, it cannot be said that Congress intended that §8 would, under the application of state law, make inapplicable the excess lands provisions of §5 of the Reclamation Act of 1902 to the Central Valley Project. That possibility is foreclosed by subsequent and continuing action by the Congress ever since the inception of the project. Such a record constitutes ratification of administrative construction, and confirmation and approval of the contracts.

Justice Clark, as the organ for the Court in *City of Fresno* v. *California*, 372 U.S. 267 (1963) again wrote:

> "We agree entirely with the disposition of the Court of Appeals. Petitioner seems to say that §8 of the Reclamation Act of 1902, 32 Stat. 390, 43 USC § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, §8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others."

In *Arizona v. California*, 373 U.S. 546 (1963), the litigation arose under the Boulder Canyon Project Act, a separate reclamation statute, 45 Stat. 1057 (1928), 43 U.S.C. § 617-617t (1958). Section 14 of the above Act, 45 Stat. 1065 (1928), 43 U.S.C. § 617m (1958) included by reference Section 8 of the Reclamation Act of 1902. In addition, Section 18, 45 Stat. 1065 (1928), 43 U.S.C. § 617q (1958) provided:

> "Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

A literal reading of the provisions of the Act would seem to have precluded the injection of federal law. However, the Court held:

> "Nor does § 18 of the Project Act require the Secretary to contract according to state law. That act was passed in the exercise of congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects, and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements. Section 18 merely preserves such rights as the States 'now' have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river."

See also Justice Brennan's opinion in *Federal Power Commission* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964).

In *First Iowa Hydro-Elec Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946), the meaning of Section 27 of the Water Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958), was at issue. This section provided:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The Court held:

> "The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights."

The language of Section 32 of the Mineral Leasing Act that "Nothing in said sections shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have" does not preclude the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests." This provision which Petitioner relies upon did not CREATE any rights in favor of the states. It did not RECOGNIZE any rights of the states. It specifically referred only to such "rights" which the States "may have". Further the language of Section 30 of the Mineral Leasing Act[10] "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated" simply has reference to the provisions or stipulations of federal leases and does not annul "federal responsibility" which is of concern here. It is well established that a federal court can fashion federal common law when the rights, interests, duties or substantive policies of the United States are directly

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[10]30 U.S.C. 187.

affected."[11] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445 (1947); *Royal Indemnity Co.* v. *United States*, 313 U.S. 389 (1941); *National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1944); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *United States* v. *Standard Oil Company*, 332 U.S. 301 (1947); *Bank of American National Trust & Savings Ass'n.* v. *Parnell*, 352 U.S. 29 (1956); *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *United States* v. *93.970 acres of Land*, 360 U.S. 328 (1959); See also *United States* v. *Taylor*, 333 F. 2d 633 (1964); *Levitt* v. *Johnson*, 334 F. 2d 815 (1964); *American Pipe & Steel Co. v. Firestone Tire & Rubber Co.*, 149 F. 2d 872 (1945); 20 Am. Jur. 2d., Courts §208 at 543; 1 A Moore, Federal Practice 0.305 (3) at 3045, 3053 and 0.324, at 3759 (2d ed. 1961); Wright, Federal Courts, § 60 at 213 (1963); Federal Courts — Rules of Decision, 50 Va.L.Rev. 1236 (1964); Clark, State Law in the Federal Courts: The Brooding Omnipresence of *Erie* v. *Tompkins*, 55 Yale L.J. 267 at 284, 285 (1946); Exceptions to Erie v. Tompkins: The survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946); Hart,

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[11]This basic principle was enunciated by the Fifth Circuit Court of Appeals in *Pan American Petroleum Corporation* v. *Wallis*, 344 F. 2d 432 at page 440 and is indisputable that: "In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors. The first question presented in the instant case is whether or not 'federal matters' are involved."

The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 509-15; 525-35 (1954); Mishkin, The Variousness of Federal Law: Competence and Discretion in the choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957); Friendly, in Praise of Erie — And of the new Federal Common Law 39 N.Y.U.L. Rev. 383, 422 (1964).

Federal Courts have always had the responsibility to effectuate the uniform implementation and protection of federal interests. It is not to be presumed that Congress ever intended that each of the several states would have, as Petitioner contends, the right to regulate, curtail or prohibit the effectiveness and consequences of the clearly comprehensive Mineral Leasing Act of 1920, as amended. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation', rules which may be necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." Mishkin, The Variousness of Federal Law, supra, at page 800.

Petitioner also denies the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests as respects the Leasing Act" because the United States did not acquire legislative jurisdiction over this land.[12] However, it is wholly immaterial whether the

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[12]"The State has not ceded jurisdiction over the lands in question, nor was jurisdiction reserved when the State was admitted into the Union (Cf. Act of Feb. 20, 1812), and, Act of Feb. 8, 1912), and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution

State has or has not ceded legislative jurisdiction over the lands. The United States has the right, power, affirmative authority and duty to "protect its lands, to control their use and to prescribe in what manner others may acquire rights in them" [*Utah Power & Light Company* v. *United States*, 243 U.S. 389 (1917)] and this rule is controlling whether or not the federal rights involved arise from the United States' possession of legislative jurisdiction under Article 1, Section 8, Clause 17 of the Constitution. The status of public domain lands in the legislative jurisdiction sense is inconsequential. In no event can local state rules interfere and extend to any matter inconsistent with the plenary power of the United States. *McCullough* v. *Maryland*, 4 Wheat 316 (1819); *Fort Leavenworth R. R.* v. *Lowe*, 114 U.S. 525 (1885); *Camfield* v. *United States*, 167 U.S. 518 (1897); *Ohio* v. *Thomas*, 173 U.S. 276 (1899); *McKelvey* v. *United States*, 260 U.S. 353 (1922); *Hunt* v. *United States*, 278 U.S. 96 (1928).

The majority opinion that certain provisions of the Mineral Leasing Act of 1920 "leave no room for operation of any State law" is obviously not in conflict with Section 32 of the Act as Petitioner asserts, because as heretofore demonstrated, Section 32 refers only to rights which the State "may have" and this does not supersede, conflict with or preclude the application of federal law. It is indisputable that Section 32 of the Mineral Leasing Act was not intended to expand state authority over federal functions and the implementation thereof.

(Supra, p. 3), and, this Court's decision in *Wilson v. Cook*, 327 U.S. 474 (1945), and *Paul v. United States* 371 U.S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied." (Page 31 of Petitioner's brief)

3. *Boesche v. Udall*

Petitioner acknowledges and does not dispute this Court's decision in *Boesche* v. *Udall*, 373 U.S. 472 (1963) but asserts that *Boesche* was erroneously interpreted below.[13]

Petitioner continues to rely on *Pan American Petroleum Corporation v. Pierson*, 284 F. 2d 649 (1960), and the early case of *Witbeck v. Hardeman*, 51 F. 2d 450 (1931) and related decisions. However, the decision of this Court in *Boesche* definitely establishes the legal distinction between a patent and a mineral lease, and further contrasts a mineral lease from a mining claim. *Pierson* placed a patent and a mineral lease in the same category and to this extent *Boesche* overruled *Pierson*, and further overruled *Pierson* as to the lack of authority of the Secretary of the Interior to cancel a mineral lease administratively.

The holding in *Pierson* was cited in the original dissenting opinion as dispositive of the litigation on the question of applicable law. (R. 87, 88) The dissenting judge in his second opinion readily admitted that "The effect of this decision *(Pierson)* is uncertain, however, in view of *Boesche v. Udall* . . ." (R. 120 n. 12)

In the *Boesche* case, the Court stated:

> "We think that no matter how the interest conveyed is denominated the true line of demar-

[13]The Court's reference to *Boesche v. Udall* is plain and unambiguous. It appears on pages 440 and 441 (344 F. 2d) of the opinion. (R. 111, 112, 113)

cation is whether as a result of the transaction "all authority or control" over the lands has passed from "the Executive Department", Moore v. Robbins, supra (96 U.S. at 533), or whether the Government continues to possess some measure of control over them."

"Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act of 1920 has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

* * *

"In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals."

The distinction between a patent and a mineral lease was delineated and affirmed in *Udall v. Tallman* 13 L.Ed. 616 (1965), which approved *Boesche*.

It is submitted that *Boesche* is conclusive authority for the rule that the government does have a continuing interest in a federal mineral lease on sovereignty land because in no sense does it divest itself of "all authority or control" therein upon issuance of the lease.

The Fifth Circuit Court of Appeals said:

"The posture of the instant case is interstitial.

The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment", but which ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the substantive independence of the federal court in determining the claims of McKenna and Pan American."[14]

* * *

"* * * we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation."[15]

"It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth

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[14] *United States v. Standard Oil Company*, 332 U.S. 301 (1947).

[15] The language of this Court in the case of *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942) is applicable herein: "* * * In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed 1188, 58 S.Ct. 817, 114 ALR 1487. There we follow state laws because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decisions within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they effect must be deemed governed by federal law having its source in those statutes, rather than by local law."

this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in other states. In a word, we think this is an area for uniformity."[16]

4. *Uniformity*

Hodgson v. Federal Oil and Development Company, 274 U.S. 15 (1927), does not support Petitioner's conclusions, but demonstrates the correctness of the interpretation of that case by the Fifth Circuit, 344 F.2d 422, footnote 7. In *Hodgson*, the plaintiff attempted to impress a trust upon a federal mineral lease on land in Wyoming. The lease interest of the plaintiff was purchased at a different time from the vestiture of title in plaintiff's cotenants. The Court held: "* * * to support the view that in equity and in good conscience the Oil and Development Co. acted for the McMannus heirs in securing the existing lease, it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship between them. This has not been done, unless such a relationship necessarily arose because of cotenancy." The Court in *Hodgson,* then stated that the Plaintiff was forbidden as a cotenant from acquiring and asserting adverse

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[16]"In our choice of the applicable federal rule, we have occasionally selected state law . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. . . The application of state law even without the conflict of laws rule of the forum, would subject the rights and duties of the United States to exceptional uncertainty. *It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states.*" (Emphasis added) *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943); See also *Southern Pacific Co. v. Jenson,* 244 U.S. 205 (1917).

title because the interest of the plaintiff accrued at a different time, and thereby plaintiff was bound by the exception to the general rule concerning a breach of trust arising out of a cotenancy derivative from an identical source. The Fifth Circuit herein specifically interpreted *Hodgson* as applying the law of the several states involving a breach of trust, saying, "We read Hodgson as fashioning a federal law of fiduciary relationship by drawing on the law of several states."

Petitioner admits (p. 60) that in *Hodgson* "* * * the Court applied Federal law to the extent possible . . ." The opinion in *Hodgson* also shows that the common law of several states was applied. As the Court indicated, if the plaintiff had alleged "definite facts (not mere conclusions) to sufficiently show some fiduciary relationship between them", plaintiff would have had adequate ground for relief. *Hodgson* does not favor the Wallis position.

The Mineral Leasing Act is federal in scope. It is a comprehensive pattern intended by Congress to preempt the field of federal mineral leases. It is intended by Congress to foster federal policy. The federal common law is fashioned basically to effectuate the rights, duties and policies of the United States in a diversity action. Therefore, the extent and legal consequences of the paramount right of the United States to know the real lessee, sublessee or assignee constitute a substantive national "interest". Otherwise, the government's admitted public policy against "lease grabbing" would be frustrated through devices designed to circumvent this policy. True ownership of a federal lease affecting the public domain necessarily involves national interests. Such ownership is not such a local matter as

may be determined by a unique local law at variance with the laws of the several states. Even the dissenting opinion acknowledges the utter confusion that the local rule has produced in the legislature and the courts of Louisiana. In fact, the parol evidence rule is in direct conflict with 43 C.F.R. 3128.1 which requires the disclosure of oral agreements.

The dissenting opinion admits that under the Mineral Leasing Act the federal government is entitled to know the identity of its mineral lessee. Yet, if the dissenting opinion were otherwise followed to its logical conclusion, the federal government would be wholly deprived of this vital right affecting the national interests because UNDER LOUISIANA LAW, AS STATED BY THE DISSENTING OPINION, EVIDENCE COULD NOT BE HEARD TO DETERMINE THE UNDISCLOSED TRUE OWNER (LESSEE, SUBLESSEE OR ASSIGNEE) OF A FEDERAL LEASE. To recognize the sanctity of undisclosed ownership because of a unique rule in Louisiana would perhaps prevent the federal government from enforcing as to public domain land in Louisiana the provisions of the Mineral Leasing Act with respect to control of acreage under the monopoly provisions thereof[17] and would place the government in the position at all times of NOT being able to ascertain the true lessee or assignee of a federal lease which affects national security — whether Louisiana law is applied to determine rights between private individuals or otherwise. This situation will

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[17]30 U.S.C. 184; 30 U.S.C. 187 A; *U. S.* v. *Trinidad Coal and Coking Co.*, 137 U.S. 160, 166, 169 (1890); Oil and Gas leases on United States Government Lands, by Ross L. Malone, Jr., Second Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, at p. 315, 324 at n. 1.

prevail until a definitive decree on the issue is entered. A decision herein applying state law necessarily will affect rights and duties of the Secretary of the Interior in this litigation.

In addition, the nature of the rights and obligations created by federal leases would be affected by a myriad of uncertainties in the absence of a uniform law which provides a certain and definite guide to the rights of the parties, rather than subjecting them to the vagaries of the laws of many states. While the business of the United States may go on without uniformity, the policy of applying federal law to these transactions is of substantive interest and concern in establishing certainty and definiteness by having one set of rules governing the rights of all parties to federal mineral leases as contrasted to multiple rules.

The following language of the second dissenting opinion indicates that it stems from "fear" that the majority holding for uniformity will result in the cataclysmic juridical devastation of long established law which would create chaos with respect to property rights of the laws of several states:

> "The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitime,

> their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I forsee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states." (344 F. 2d 444)

It is difficult to understand the "alarming implications" of the dissenting opinion because:

(a) The law of the land as expressed in *Hood* v. *McGehee*, 237 U.S. 611, 615 (1915) is uncontroverted that each state is sole mistress of the devolution of land by descent, and this principle embraces any real right the situs of which is in the particular state. The devolution of property is governed universally by local laws of descent and distribution which remain unaffected by the majority decision.

(b) As stated by the author of the dissenting opinion as the organ of the Court in *Akin* v. *Louisiana National Bank of Baton Rouge*, 322 F. 2d 749 (1963), "There are several reasons why a federal court has no jurisdiction to probate a will or to administer an estate".

The applicability of uniformity to federal leases obviously does not hinge on "alarming implications". Federal law governs the effectiveness and consequences of the Mineral Leasing Act including the own-

ership of the federal lease which is at issue in this litigation, while state law remains untouched to regulate descent and distribution.

5. *Issues Asserted on Merits of the Case by Pan American but not passed upon by the Court of Appeals*

The Option Agreement embraces the subsequently filed public domain application in light of paragraph II, (the omnibus clause) which stipulated:

> "Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands." (R. 42)

In summary, Pan American's position is that "leases" on "all lands described in the above referred to applications" are covered specifically without reference to the "character" of the lands or the "form" on which Wallis was to obtain the leases. Pan American's agreement was, therefore, to acquire an option on leases to be obtained by Wallis on the specific lands. It was not an option to acquire FORMS. The Court of Appeals on rehearing noted that, "Pan American has petitioned for a rehearing limited to the interpretation of its claimed Option Agreement with Wallis . . ." (R. 108) The Court, however, did not determine whether the contract covered the land involved. This issue must be decided by the Court of Appeals regardless of the law that is to govern the case. Secondly, under Louisiana law — dehors the parol

evidence rule or the constructive trust doctrine — the ownership of the lease belongs to Pan American. Louisiana law does not permit Wallis to profit by his wrongdoing in sabotaging the acquired lands applications to prosecute his public domain application for personal profit. Both applications admittedly cover the identical land. (R. 69) The Option Agreement imposed on Wallis a duty to diligently prosecute the acquired lands applications. His obligation under the Option, separate and apart from his fiduciary relationship, requires him to restore to the coverage of the Option whatever he attempted to gain personally by his wrongful act in prosecuting the "public lands" offer to the utter exclusion of the "acquired lands" offers — by designedly entering into competition with his Optionee to defeat the purpose of the Option. The admitted acts of Wallis which destroyed the "acquired lands" applications are:

1. The use in "his" public lands offer of a "better" and "foolproof" description which connected the metes and bounds description of the unsurveyed lands with a corner of the public lands survey for his own account which the pending "acquired lands" offers under Option did not do.

2. The filing of an offer on the "public lands" form for his personal gain in direct competition with the pending "acquired lands" offers.

3. The filing of a Protest on March 26, 1956, in active prosecution of his "personal" public lands offer attacking only the Morgan public

lands offer and omitting consideration by the Bureau of the original acquired lands offers or the "new" offer on the acquired lands form secretly filed in the name of his brother-in-law, T. Miller Gordon.

4. The prosecution of his "personal" public lands offer to the complete exclusion of the acquired lands offers in the Bureau of Land Management, before the Secretary of the Interior, in the United States District Court for the District of Columbia, and in the United States Court of Appeals for the District of Columbia and in this Court in the *Morgan* case.

The decision of the Department of the Interior involving the lease issued to Wallis is noted in 65 I.D. 369, 372. It constitutes overpowering evidence that Wallis deliberately sabotaged the "acquired lands" offers. It also demonstrates the administrative ruling, subsequently approved by the courts, that although Wallis, and not Morgan, was entitled to a lease the ruling itself never actually constituted an adjudication on the basis of legal evidence that the subject acreage is "public" rather than "acquired". The Department of the Interior's decision reads:

". . . Although all the parties are maintaining both types of offers, not one of them is insisting that the Director's determination is in error. For example, Wallis has not appealed from the Director's decision which rejected Morgan's public land offer and remanded his own public land offer for adjudication in accordance therewith."

That Wallis sabotaged any rights which Pan American had under the Option to acquire leases on the "acquired lands" form in order to validate his "personal" public domain offer is plainly evident from the decision of the United States Court of Appeals for the District of Columbia in the *Morgan* case (306 F. 2d 799, 800) which was rendered on July 5, 1962, wherein the court in affirming the decision of District Judge Hart, said:

> "The Director of the Bureau of Land Management concluded that the lands in question were not and could not have been at any time "acquired lands," for the United States had never previously divested itself of title to the lands in issue, only thereafter to re-acquire them. Accordingly he ruled that the law and the regulations pertaining to *public* lands must control.
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> "Thereupon he gave Wallis and Morgan thirty days within which to show cause and to submit briefs and evidence with respect to that ruling. *Neither party responded.* The Director then ruled that his decision eliminating the "acquired lands" applications had become final, the offers thereunder were deemed finally rejected, and as to those applications, the case was closed.
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> ****
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> "The Secretary also rejected the Morgan public land offer on the ground that Morgan had failed to connect the metes and bounds de-

> scription of unsurveyed lands with a corner of the public lands surveys. He ruled additionally that the description in the Morgan application was insufficient under the applicable regulation to identify the land. It may be noted that the regulations also provide that an offer will be rejected and will confer no priority unless it be completed in accordance with the regulations."

It is accepted practice that whenever an applicant is in doubt as to the character of the land in question, he may file two applications to insure full consideration. Cf. *Seaton* v. *Texas Co.*, 256 F.2d 718. There is no law which permits Wallis to avoid his obligation under the Option to take advantage of the situation created for personal profit. An indisputable fact is that the success of Wallis in defeating the Morgan offer is attributable entirely to the curing by Wallis of the erroneous original description because *"there was no dispute before the bureau with respect to the character of the land."* Morgan did not question the character of the land and Wallis elected not to do so to serve his selfish interest. The memorandum for Stewart L. Udall, Secretary of the Interior, No. 523, in opposition to the petition for a writ of certiorari in *Morgan* v. *Udall*, shows:

> "To the extent that the lands in issue here are islands arising in the marginal sea, petitioners do not deny, and, therefore, we assume for purposes of this case, that the decisions of this Court in *United States* v. *California*, 332 U.S. 19, and *United States* v. *Louisiana*, 339 U.S. 699, are applicable to such islands."

It is general law[18] that once Wallis decided to file new applications his clear duty was to notify and offer Pan American any lease which he might obtain under either offer regardless of the technical character of the land.

The "diligent efforts" of Wallis obviously were made to obtain his "personal" lease. Wallis then became not only an unfaithful servant but *in addition thereto* violated the express language of Paragraph II of the Option and *prevented* any possibility of Pan American acquiring a lease.

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[18] "***Duty of Agent to Give Principal Notice of Facts Material to Agency.*** — It is the duty of the agent to give to his principal reasonable and timely notice of every fact relating to the subject matter of the agency, coming to the knowledge of the agent while acting as such, and which it may fairly be deemed material for the principal to know for the protection or preservation of his interests.

This duty may take on a variety of forms. As has been already seen, the duty of loyalty to his principal may require that the agent shall disclose to his principal the existence of adverse interests, either in the agent, or in others whom he represents, which are inconsistent with the full and fair performance by the agent of his duty to his principal.

Loyalty to his trust, the first duty of the agent. — Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.

May not put himself in relations antagonistic to his principal. — It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his own interests or the interests of others whom he also represents become antagonistic to those of his principal. . ." Mechem on Agency, 2nd Ed., Vol. 1, Sections 1383, p. 993,1188, p. 867; 1189; p. 867.

The District Judge erroneously tossed aside Paragraph II by saying "It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph." The District Court failed to say what the "additional duty" was. *The fact is the District Court did recognize that Paragraph II imposed a duty on Wallis.* That duty, even under the District Court's interpretation of the Option, was the obligation contracted by Wallis "to make diligent efforts to acquire leases," etc. on the land. The decision of the District Court is an incredible benediction of wrong doing which does violence to Louisiana law. *The Civil law condemns the action of a contracting party, WHETHER A FIDUCIARY OR NOT, in violating his contract to acquire rights in the subject matter thereof for his personal gain.* Under Louisiana law, Wallis could not compete for leases on the same land against Pan American.

The Civil Law on this subject is symbolized by Article 2040 of the Civil Code of Louisiana, which reads:

> "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it."

The dissenting opinion in *Walls vs. Smith,* 3 La. 498, which dissenting opinion was later adopted by the Louisiana Supreme Court in *Onarato* vs. *Maestri,* 137 So. 67, 173 La. 375, established that under Article 2040 the condition is considered as accomplished when the debtor whose obligation depends on the condition, prevents the accomplishment of it. The decision is specific

that the law does not permit the party whose obligation depends on a condition to allege the non-performance of that condition in defense where it was through his fault that it was not performed. The rule is based on plain honesty and decency. No man can take advantage of his own wrong and the law has been careful to make a special application of this maxim to cases where conditions form a part of the contract. *Pothier On Obligations #212.*

In *George W. Garig Transfer, Inc.* vs. *Harris,* 75 So. 2d 28, 226 La. 117, the plaintiff brought suit to be declared *owner* of a Louisiana Public Service Commission certificate authorizing operation of a common carrier motor freight service. The facts, which were undisputed, established that the defendant agreed to sell the certificate for $4,000.00 cash and that such amount was placed in escrow subject to the approval of the transfer by the Public Service Commission to be sought by a joint petition to such body. Subsequent to the filing of the joint petition defendant filed a written motion stating his desire to withdraw from the joint petition and to have the matter dismissed. The Commission ruled that the transfer would have been approved if defendant had not withdrawn from the application but that it was not within their power to prevent such withdrawal. The Supreme Court based its decision on the dissenting opinion in the *Walls* case, and held that because the condition of approval by the Commissioner had been prevented by the defendant, under Article 2040 of the Civil Code such condition must be considered as accomplished. *Plaintiff was accordingly declared owner of the certificate.* Again, in *Lloyd* v. *Dickson,* 40

So. 542, 116 La. 90, the Court based its reasoning on Article 2040 and said:

> "If instead of standing loyally by their contract with plaintiff the defendants enter into a contract destructive of it, the condition, as a matter of course, can never be fulfilled; but it is perfectly plain that a party cannot get out of his contract in that manner."

See also *D'Avricourt* vs. *Seeger*, 125 So. 735, 169 La. 620, (1906) and *United Gas Public Service Co.* vs. *Christian*, 173 So. 174, 186 La. 689 (1937).

The case of *Welsh* v. *Wyatt*, (Second Circuit 1964) 164 So. 2d 393, rehearing denied May 28, 1964, writ to the Louisiana Supreme Court denied on June 30, 1964, is the last expression on the subject and is dispositive of the issue.

Plaintiff and Defendant entered into an agreement whereunder Plaintiff agreed to sell and Defendant agreed to buy *certain described real estate* within the State. The agreement contained the provision that it was subject to obtaining necessary zoning of the property and expressly stated "buyers are to have ninety days to obtain said zoning." Prior to the expiration of the 90 days, Plaintiff advised Defendant by letter that Defendant's application for the zoning change might not be approved within the ninety day period and that he was agreeable to extending the contract for another sixty days. Plaintiff requested that Defendant sign a copy of the letter and to return one copy to him. Following receipt of this letter Defendant did not sign as requested. Defendant subsequently advised

Plaintiff that he would not buy the property involved, and the suit for specific performance followed.

The Court stated that there was no doubt that the rezoning could have been secured timely, that Defendant was in default by preventing the fulfillment of the condition he was obligated to perform and that Defendant's refusal to purchase the property would not prevent Plaintiff from obtaining *specific performance*. The Court in reviewing the applicable law which is absolutely controlling in this case held:

> "Also the Code provides that '(w)hen an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event having taken place'. The condition is considered as fulfilled when the fulfillment of it has been prevented by the party bound to perform it." LSA-C.C. Arts. 2048, 2051, 2038 and 2040.
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> * * * *
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> "The above reference from our Civil Code and Planiol are ample authority to the effect that Myatt was in default when the ninety-day period ended and re-zoning had not been obtained except for the extension granted by Welsh. In granting the sixty-day extension, the act of Welsh was unilateral in character, neither requiring written consent nor any other action by Myatt, for at the time Myatt's obligation was in default and subject to the will of Welsh who gratuitously gave an exten-

> sion within which Myatt could easily have accomplished the re-zoning."

Specific performance of the contract was granted as prayed for in the petition.

In *Garig* the Louisiana Supreme Court decreed OWNERSHIP of the certificate involved for violation of the sacred precept stated in Article 2040, and in *Welsh,* the Court decreed specific performance of a real estate contract of purchase for the identical reason. There is no Louisiana law to the contrary.

In sum, it is respectfully suggested to this Honorable Court that if *Erie* be controlling and Louisiana law governs the rights of the parties, this case should be remanded to the Court of Appeals for interpretation of the Option Agreement and the propriety under Louisiana law of a decree recognizing Pan American's ownership of the lease and specific performance of the Option Agreement. Otherwise, Pan American will have been denied an appeal to review the merits of the litigation under Louisiana law.

In *Bank of America* v. *Parnell,* 352 U.S. 29, (1956) this Court, in language peculiarly applicable here, held:

> "This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court

to review the judgments of the District Court in the light of the controlling state law."

As the court of last resort in this country and thus the ultimate guardian of justice in this land, this Court has fostered and developed procedures calculated to serve the high purposes of expeditious disposition of litigation, the avoidance of multiplicity of suits, the elimination of delay and the establishment of the rights and obligations of litigants so as to eliminate uncertainty. This suit has been pending seven years (R. 32) but Pan American's rights under Louisiana law have not been adjudicated by the Court of Appeals. Pan American, therefore, respectfully submits that it is within the power and duty of this Court, if federal law does not control, to remand the case for a decision on the merits under the Louisiana law.

CONCLUSION

The opinion of the Fifth Circuit is eminently correct. It succinctly delineates the standards to be followed as announced in repeated decisions of this Court governing the application of federal law in a diversity action. The Opinon stands firm against any challenge. The rule set forth by the Court below creates no imbalance in the scale between federal and state relationships. For the reasons stated, it is submitted that the opinion and decree of the Court of Appeals be affirmed. In the alternative, it is submitted that the case should be remanded to the Court below to pass on the Option Agreement and Louisiana law without reference to

parol testimony or the common law doctrine of resulting or constructive trusts.

Respectfully submitted,

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